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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a federal court may hold facially void, for want of public use or purpose, a state statute authorizing exercise of eminent domain powers to permit the state's residents to purchase the land on which they live, so as to alleviate what the legislature has found to be acute and widespread social and economic hardships arising from a unique and enduring concentration of land ownership in the hands of a few.

2. Whether a federal court may proceed to invalidate a state eminent domain statute on federal constitutional grounds despite pending state condemnation proceedings in which the federal plaintiff has invoked those federal grounds and has also argued that state law independently requires both the taking agency and state courts to reject the state legislature's findings of public use and purpose.*

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* The state defendants below were the Hawaii Housing Authority ("HHA"), the Commissioners of the HHA (Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y.K. Sunn). At the time this Jurisdictional Statement is being filed, Commissioners Tom, Tamura, and Chang have been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom has succeeded Mr. Sunn as Executive Director. The HHA, its Commissioners, and its Executive Director are appellants before this Court.

Intervenors-defendants given leave to intervene by the district court below, and appellants before this Court, are the following lessee associations: Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach)†; Kokohead Community Lease-Fee, Inc.†; West Marina Community Association†; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.†; Kamiloiki Community Association; Lunalilo Marine Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community

Association; Kahala Community Association, Inc.†; Kahala Community Fee Purchase Fund*; and Halawa Valley Estates Fee Conversion Corporation. (Those marked with a "†" are appealing separately and filing separate jurisdictional statements.)

Plaintiffs below, appellees before this Court, were the Trustees of the Bishop Estate ("Bishop Estate" or "Estate"): Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. Mr. Ching has since been succeeded by William A. Richardson.

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, dated March 28, 1983, from which this appeal is taken, is reported at 702 F.2d 788 (9th Cir. 1983) (per Alarcon and Poole, JJ.; Ferguson, J., dissenting), and is reprinted as Appendix A.* The Ninth Circuit decision reversed a judgment of the United States District Court for the District of Hawaii (per King, J.). The district court's decision granting partial summary judgment to appellants, dated December 19, 1979, is reported at 483 F. Supp. 62 (D. Haw. 1979), and is reprinted as Appendix B. The district court's decision on appellees' motion for preliminary injunction, dated May 8, 1979, is reported at 471 F. Supp. 871 (D. Haw. 1979), and is reprinted as Appendix C.

* The appendices to this Jurisdictional Statement are bound in a separate volume.

JURISDICTION

The Bishop Estate brought this action for declaratory and injunctive relief in the United States District Court for the District of Hawaii under 28 U.S.C. §§ 1331, 1343, & 2201, and 42 U.S.C. § 1983. The district court granted partial summary judgment to the state defendants and the intervenors-defendants, rejecting the Estate's claim that the Hawaii Land Reform Act violated the Fifth and Fourteenth Amendments to the United States Constitution. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, declaring the Hawaii Land Reform Act invalid on its face. *See* Appendices A and D. Rehearing was denied June 17, 1983. *See* Appendix E. Appellants filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit on July 15, 1983. *See* Appendix F.

Because the Ninth Circuit's judgment invalidated a state statute on federal constitutional grounds, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, is reprinted in full as Appendix G. The text of the original 1967 Act, 1967 Haw. Sess. Laws Act 307, is reprinted in relevant part as Appendix H. The relevant portions of the 1975 amendments to the Act, 1975 Haw. Sess. Laws Acts 184, 185, and 186, are reprinted as Appendices I, J, and K. The Hawaii Eminent Domain Law, Haw. Rev. Stat. ch. 101, is reprinted as Appendix L.

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution freezes our fiftieth state into its feudal past. A central legacy from that past is a system of land ownership concentrated uniquely and enduringly in the hands of a few. Under the land tenure system begun by King Kamehameha I in the eighteenth century, the crown granted lands to a hierarchy of chiefs who in turn oversaw a large class of tenants. By the mid-nineteenth century, subinfeudation had bred what King Kamehameha III denounced in his 1842 legal code as a multitude of landlords over the same tenants, each able oppressively to exact land, labor, and property from the tenants under his rule. In an unsuccessful attempt to cure these ills, the King divided all the lands of the kingdom among the crown, the government, the chiefs and the common people in the Great Mahele of 1848. But the chiefs received much of the land; the commoners, little. And the acquisition of vast tracts of land for plantation agriculture only increased this concentration of land ownership by the turn of this century.

As this lawsuit began, the land of Hawaii was still held in the tight grip of what the state's legislature and courts described as an oligopoly, or a quasi-monopoly.[1] On Oahu, where the State's population is concentrated, 22 major landowners owned 72.5% of the total land area,[2] with three major landowners owning 58.4% of the land privately held on Oahu—nearly 40% of its total area.[3] The Bishop Estate alone owned 22.1% of all the privately held land on Oahu—over 15% of its total area.[4] "It has been the policy of these [large] landholders to offer long-term leases to individual lessees, rather than to

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1 *See* 1975 Haw. Sess. Laws Act 185 § 1; *see also Midkiff v. Amemiya*, Civil No. 47103 (Haw. Cir. Ct. June 29, 1978) (Findings of Fact Nos. 118-119).

2 *See* 1975 Haw. Sess. Laws Act 184 § 1(a).

3 *See Midkiff v. Amemiya*, *supra* n.1 (Finding of Fact No. 96).

4 *See id.* (Finding of Fact No. 97). The Bishop Estate today owns 341,512 acres in the State of Hawaii—an area equivalent to the entire land area of Oahu.

offer residential lots in fee."[5] It was this residential leasehold system, run by the few large landowners, that the Hawaii legislature, after years of hearings, found injurious to the public welfare of Hawaii in manifold ways, and sought to remedy by enacting the Land Reform Act of 1967.

A. Why The Hawaii Land Reform Act Was Passed.

The barriers posed to widespread residential land ownership by the leasehold system in Hawaii were a continuing subject of acute legislative concern even before statehood.[6] As ultimately enacted in 1967,[7] the Land Reform Act chose condemnation of residential houselots for sale to the lessees living there as the mechanism for lowering these barriers. One other mechanism—requiring owners to give lessees options to purchase the land on which they lived—was expressly considered and rejected, precisely for the reason that it would have yielded less income tax advantage to the large landowners.[8]

The Hawaii legislature predicated the Land Reform Act, as well as the amendments to the Act and related legislation

5 *Midkiff v. Tom*, 483 F. Supp. at 65. A65.

6 A 1955 Territorial Senate resolution called upon the large estates to divest some of their highly concentrated land holdings for residential purchase. A 1959 Territorial law, reenacted after statehood as 1961 Haw. Sess. Laws Act 6, provided for state acquisition of private land through eminent domain for residential use. Several bills drafted by the state legislature in 1963 provided for options for lessees to purchase leased land. *See* 1963 Haw. House Bill Nos. 24 & 409. The findings underlying each of these acts and bills were substantially similar to those underlying the 1967 Act.

7 1967 Haw. Sess. Laws Act 307. A141-43. (Hereinafter "Act 307.")

8 As originally drafted, 1967 Haw. Senate Bill No. 1128 provided both for options to purchase, and for condemnation, as means by which lessees could acquire title to land. But special hearings at which representatives from the large landowning estates, as well as officials of the Internal Revenue Service, presented their views convinced the legislature that the option-to-purchase mechanism would cause the landowners substantially greater income tax liability than the condemnation mechanism. Expressly to prevent "the tax status of the landowners [from being] affected adversely," the Senate thus redrafted Bill No. 1128 in the form ultimately enacted as Act 307. *See* 1967 Haw. Senate Standing Committee Report No. 483. *See also* Haw. Rev. Stat. § 516-27.

enacted in 1975,[9] on extensive findings—after years of hearings and many volumes of testimony, reports, and studies—of acute and widespread social and economic hardship caused by the residential leasehold system. The legislature found that the small group of large landowners that owned more than three-fourths of the land[10] had persistently refused to sell such land in fee simple, instead leasing it for residential development.[11] This practice in turn led to a critical shortage of residential land for sale to a rising population with a rapidly increasing demand for single-family houselots, thereby driving up land prices and rents.[12] Thus short supply and inflated prices combined to deprive many thousands of Hawaii residents of an effective choice whether to live on land that they could call their own.[13]

Nor, the legislature found, would these conditions change were the land market left unregulated. *First*, without the reform statute the estates would continue to have strong disincentives to sell their land—both because of restrictive indentures in their trusts, and because of the tax liability such sales would incur.[14] *Second*, the sheer inequality of bargaining power created by the "oligopolistic market" enabled the lessors to exact "exorbitant rents," so that the shortage of fee sales would continue to be a situation "the free market cannot correct."[15]

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9 1975 Haw. Sess. Laws Acts 184 (A144-46) and 186 (A152-57) amended the Land Reform Act, and Act 185 (A147-51) provided for related controls on leasehold rent renegotiation. (Hereinafter, "Act 184," "Act 185," and "Act 186.")

10 Act 307 § 1(c).

11 Act 307 § 1(c)-(e); Act 184 § 1(b); Act 186 § 2(a)(1)-(2).

12 Act 307 § 1(d) & (g); Act 184 § 1(d)(1)-(3); Act 185 § 1; Act 186 § 2(a)(2)-(4).

13 Act 307 § 1(f)-(g); Act 184 § 1(c); Act 186 § 2(a)(3)-(4).

14 Act 307 § 1(e). *See also* n.8 *supra*.

15 Act 185 § 1. *See also* Act 184 § 1(d)(5)-(6).

The legislature intended the Land Reform Act to redress the leasehold system's injury to the public in at least four basic ways: *first*, by increasing the availability and turnover of land for single-family residential acquisition; *second*, by "dispers[ing] ownership of fee simple residential lots to as large a number of people as possible"[16]; *third*, by reducing the disproportionate market power of the few large landowners; and *fourth*, by containing the various forms of social disruption and expense the leasehold system might trigger.[17] The legislature concluded, as it had to on the record before it, that the Act would realize public purposes and put land to public use.[18]

B. How The Hawaii Land Reform Act Works.

Any lessee living on a single-family residential land lot of no more than two acres,[19] within a development tract at least five acres in size,[20] may file an application with the HHA to purchase a fee simple interest in the lot.[21] To be eligible, an applicant must, among other things, own a house on the lot,

16 Act 307 § 1(j).

17 By inflating land prices and rents, the leasehold system had escalated the cost of living in Hawaii--so greatly, the legislature found, as to threaten the ability of many Hawaii residents to maintain a decent standard of living. Act 186 § 2(a)(6), (7) & (9). It thus threatened to cause the state additional public expense to feed and clothe as well as house those residents who could no longer afford to do so themselves. For example, the legislature specifically found that, when lease rents took huge upward jumps upon expiration of a lease term, the now-elderly residents who had held onto the leasehold for its full term were, "by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing," and forced to drop into the already swelling ranks of those needing to be publicly housed. Act 185 § 1; *see also* Act 184 § 1(e). Furthermore, the legislature expressed its fear that the strictures of the leasehold system could cause lawlessness "irreparably rend[ing] the social fabric." Act 186 § 2(a)(7).

18 Act 307 § 1(j); Act 186 § 2(a)(4)-(13).

19 Haw. Rev. Stat. § 516-1(11). Chapter 516 is reprinted at A109-40.

20 *Id.* § 516-1(5).

21 *Id.* § 516-22.

show proof of ability to pay the HHA for a fee interest in the lot, and not own residential land elsewhere nearby.[22] If eligible applications are filed by the lessees of at least 25 lots or half the lots in the tract (whichever is less), the HHA holds a public hearing, upon public notice, to determine whether acquisition by the state, through condemnation or purchase under threat of condemnation, of fee simple interests in lots in all or part of the tract, will "effectuate the public purposes" of the Act.[23]

If the HHA finds that those public purposes would be served, it designates some or all of the lots in the tract for acquisition.[24] The HHA then acquires the fee interests in the designated lots, either at the conclusion of condemnation proceedings brought under the Eminent Domain Law,[25] or by settling with the landowner directly.[26] By either method, the HHA acquires on behalf of the state the former fee owner's full "right, title, and interest" in the lots.[27]

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22 *Id.* § 516-33(3), (4), & (7).

23 *Id.* § 516-22. The Act's original requirement that the HHA also find a shortage of fee simple lots in the surrounding county (unless certain other conditions were present), Act 307 § 11, was deleted in 1976, 1976 Haw. Sess. Laws Act 242 § 2.

24 The Act was amended in 1975 to permit designation not just of entire tracts but of selected lots within a tract. 1975 Haw. Sess. Laws Act 184 § 2(6).

25 Haw. Rev. Stat. ch. 101. A158-78. Eminent domain proceedings are brought in the Hawaii circuit courts. *Id.* § 101-10. If the condemnee's answer to the complaint denies that a taking will be for a public use, that issue may be immediately tried to the judge, and an interlocutory appeal from the judge's ruling taken directly to the Hawaii Supreme Court. *Id.* § 101-34. Compensation is determined at a valuation trial with a right to a jury. *Id.* § 101-23.

26 In either case, compensation must equal the fair market value of the owner's leased fee interest as of the date of designation. *Id.* §§ 516-1(14), 516-24. The adequacy of compensation is not at issue in this case.

27 *Id.* § 516-25. Title passes only after payment, *see id.* § 101-26. The HHA is authorized to finance acquisitions with funds raised by issuance of general obligation bonds or by amounts advanced from general State funds. *Id.* § 516-45.

Having acquired title, the HHA must sell its interest in a lot within 60 days to a lessee if the lessee has applied, qualified, and executed a contract with the HHA to purchase that lot.[28] The HHA may lend such an applicant up to 90% of the purchase price at a reasonable rate of interest, subject to certain restrictions—including that the HHA have the right to repurchase the lot if the borrower decides to resell it within ten years.[29] If the HHA does not sell a lot it acquires to a lessee residing there, it may lease it or sell it to anyone on public notice,[30] subject to a general prohibition against its operation for profit,[31] and subject to all other rights provided to lessees by the Act.[32] In any case, the HHA may not sell in fee simple to any one purchaser, or lease to any one lessee, any more than one lot.[33]

C. State Proceedings Before And During This Federal Action.

The machinery of the Land Reform Act had been set in motion by the state against various tracts owned by the Bishop Estate long before the Estate filed the federal complaint herein on February 28, 1979, and has continued to operate against those tracts and many others at all times since. Two examples in particular illustrate this continuum.

First, the taking of Wai-Kahala Tract "H" had already been found by the HHA to effectuate the public purposes of the Act, and that tract had been designated for acquisition by the HHA on October 20, 1978, following a public hearing held on April 22, 1977—a full 22 months before the Estate went to federal court. This designation, moreover, had been appealed

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28 *Id.* § 516-30.

29 *Id.* §§ 516-34, 516-35.

30 *Id.* §§ 516-28, 516-29, 516-31.

31 *Id.* § 516-32.

32 *Id.* §§ 516-61 to 516-70 (Rights of Lessees).

33 *Id.* § 516-28.

to a Hawaii circuit court, which had remanded the case to the HHA for further findings regarding public purpose.[34]

Second, the Kamiloiki Valley tract, which ultimately became the test vehicle for an extensive, just-completed state court trial of public use or purpose, had already been the subject of a public hearing before the HHA on February 22, 1979. Prior to that hearing, and fifteen days before filing this federal action against the HHA, the Bishop Estate submitted to the HHA a written opposition, dated February 13, 1979, in which it charged that chapter 516 violated the constitutions of Hawaii and of the United States because, among other things, it authorized takings for no public use or purpose. The Estate argued that the HHA should therefore refuse even to designate Kamiloiki Valley or other tracts. The HHA entertained this argument but ultimately rejected it, finding that the acquisition of Kamiloiki would serve the Act's public purposes and designating it for condemnation on October 17, 1980. Condemnation proceedings, filed in state court November 10, 1980, then moved to the valuation phase, in which the jury rendered a just compensation verdict on November 3, 1982.

Meanwhile, the first two appeals by major landowning estates from trial court determinations that tract condemnations under the Act would serve a public use and purpose reached the Supreme Court of Hawaii. On November 10, 1982, that court reversed and remanded, declining to reach the federal or state constitutional issues it deemed "of first impression," and "of vast public import," without having before it an extensive record of findings—including findings about "what the legislature had before it when it enacted what is now Chapter 516 and the amendments thereto."[35] It therefore instructed the lower courts to conduct further trials on public use and purpose. The Kamiloiki proceeding was determined to be the appropriate case for that public use trial. After extensive

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34 *See Wai-Kahala Tract "H" v. Midkiff*, Civ. No. 55837 (Haw. 1st Cir. Nov. 29, 1978), subsequently settled.

35 *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (1982) (per curiam). *See also Hawaii Housing Authority v. Brown*, No. 8489 (Haw. Nov. 10, 1982).

hearings at which voluminous evidence was presented, the state trial court determined that condemnation of Kamiloiki Valley would serve a public use and purpose and that the Act, both on its face and as applied, was fully constitutional.[36] After it is embodied in a final judgment, that ruling will presumably be appealed to the Hawaii Supreme Court by the Bishop Estate. Numerous other condemnation actions likewise proceeded throughout this federal action.[37]

D. The Federal Proceedings Underlying The Judgment Below.

The Bishop Estate filed a complaint against the state defendants in the United States District Court for the District of Hawaii on February 28, 1979—during the pendency of HHA proceedings in the Kamiloiki Valley and other cases, and on the eve of arbitration proceedings in the Wai-Kahala Tract "H" case. The Estate alleged that the Hawaii Land Reform Act was unconstitutional on its face, among other things because it deprived "the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Complaint ¶ 14.) The state defendants' answer not

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36 *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408 (Haw. 1st Cir. July 8, 1983) (oral ruling of Grieg, J.)

37 The federal district court below specifically refused to enjoin designation or condemnation proceedings under the Act. *Midkiff v. Tom*, 471 F. Supp. at 886. A104. By November 1979, when the district court heard the first motions for summary judgment in the present case, the HHA had held public hearings on the designation of nearly 7000 of the Estate's lots, and had initiated two condemnation actions in addition to Tract "H"—all of which were settled during the federal district court proceedings. By April 3, 1980, when the district court heard the remaining motions for summary judgment, the HHA had held public hearings concerning 1500 additional lots of the Estate, and had filed another condemnation action in state court, which was settled after the district court's final judgment of June 10, 1980. Eighteen more condemnation actions had been filed in state court against Bishop Estate lots by the time the appeal below was argued in the Ninth Circuit. As of the filing of this Jurisdictional Statement, there are pending in state court 24 condemnation actions involving over 3500 lots. The Bishop Estate is seeking from the Ninth Circuit injunctive relief against all such state proceedings under the Act.

only denied that allegation but also objected to any federal judicial intervention before the state's courts had had a chance to provide "authoritative interpretations" of the Act "which may preclude the necessity for a decision of the constitutional issues raised by the Complaint." (State defendants' Answer ¶ 18.)

After a hearing on April 24-27, 1979, the district court refused to grant the Estate any preliminary injunctive relief from designation or condemnation proceedings.[38] On December 9, 1979, the district court granted partial summary judgment to the defendants and intervenors-defendants, holding the Act constitutional under the public-use requirement of the Fifth and Fourteenth Amendments. The district court found the goals of the Act well within the bounds of the state's police power,[39] and the means the legislature chose to serve those goals in no way arbitrary, capricious, or selected in bad faith.[40]

On appeal from the district court's judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, in an opinion announced nearly three years after appeal was taken. Relying principally on general statements by Madison and Hamilton and on the theories of such seventeenth- and eighteenth-century writers as Grotius and de Vattel rather than on any twentieth-century judicial precedent, 702 F.2d at 790-93 (A5-10), the court's opinion, per Alarcon, J., curtly dismissed years of painstaking legislative investigation and the voluminous findings to which such study led, *see* pp. 2-4 *supra*, as mere "rationalizations" for "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit," 702 F.2d at 798 (A21). Such "appease[ment] [of] the desires of a landless majority to own residential land," *id.* at 793 (A10), the court

38 *Midkiff v. Tom*, 471 F. Supp. at 886. A104. The district court did, however, preliminarily—and later permanently—enjoin the use of the mandatory compensation formulas and arbitration-of-compensation procedures then provided for by the Act. Defendants and intervenors-defendants did not appeal this ruling, and the formulas and arbitration provisions have since been repealed by the legislature, 1980 Haw. Sess. Laws Act 107.

39 483 F. Supp. at 67-70. A70-75.

40 483 F. Supp. at 69, 70. A73-74, 75. Final judgment was entered by the district court on June 10, 1980.

announced, was "majoritarian tyranny," *id.* at 790 (A5), which inherently violated "the private property rights of the landed minority," *id.* at 798 (A21), and thus transgressed on its face "the public use limitation of the fifth and fourteenth amendments," *id.* (A21).

Joining the court's opinion, Judge Poole also wrote separately to explain why he thought it "manifestly" correct. *Id.* at 799. A21-22. While doubting the Act's efficacy and necessity, *id.* at 804-07 (A32-38), he agreed that its fatal flaw lay simply in its facial operation to "prefer[] B's ownership of the land to A's," *id.* at 807 (A38). Whatever social gain might be wrought by effectuating such a preference, he reasoned, only a "Huxleyan advent" so sweeping as to overturn "Magna Carta" could validate even a compensated " 'redistribution' of the property of others." *Id.* A37.

Neither member of the majority thought abstention called for. *Id.* at 789-90 n.1 (A2-4); 799-803 (A22-31). Judge Ferguson, dissenting, concluded "that instead of reaching the merits . . . , the majority should have abstained in favor of ongoing state judicial processes," and held that, in any event, Hawaii's "land reform program . . . does not result in an unlawful taking of property." *Id.* at 819. A63.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE NINTH CIRCUIT'S INVALIDATION OF HAWAII'S LAND REFORM ACT USURPED STATE LEGISLATIVE POWER IN A MANNER UNPRECEDENTED IN THIS CENTURY.

Wholly ignoring the elaborate findings of Hawaii's legislature explaining why land reform was a public necessity, the court below announced a wooden and inflexible rule: a state's use of its taking power to transfer land from one group of owners to another is per se invalid as a taking for a private purpose. This is not, and could not be, the law. For this Court—having long ago forbidden federal courts from sitting as superlegislatures to second-guess the wisdom of state socioeconomic measures—has repeatedly upheld as rational state laws that, through coercive regulation, enhance the value of

the property of one group at the specific expense of another. *See* I.B *infra*. Indeed this Court has long held that such laws *must* be upheld so long as their fulfillment of legitimate public purposes is even "debatable." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (emphasis added).

Had Hawaii's legislature chosen to deploy the police or taxing powers rather than the taking power to attack the residential leasehold system that it found, for many reasons, injurious to its public—for example, by requiring option-to-purchase provisions in long-term leases—there can be no serious question that a federal court would have been bound to uphold that exercise of power. For the ends that Hawaii's legislature designed the Land Reform Act to serve are manifestly public and significant, *see* I.A. *infra*, and no regulatory mechanism that might debatably achieve those legitimate public ends could be invalidated. Rather, the *only* reason the court below gave—and could have given—for its strict scrutiny of the Act's public purposes was that the Act authorizes transfers of land between private parties under the *taking* power.

But no closer scrutiny can properly be applied by a federal court to a state legislative determination that a *taking* will serve a public purpose, than to a state legislative decision that a redistribution through *coercive regulation* (or through taxation) will serve a public purpose. "For the power of eminent domain is merely [a] *means*" to an otherwise legitimate public end, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis added), and the principle that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . admits of no exception merely because the power of eminent domain is involved," *id.* at 32. If anything, state taking legislation coupled with just compensation merits even *less* scrutiny for public purpose than does redistributive state action under the police power or the taxing power, because such taking legislation does not even redistribute aggregate wealth: the state must back up any determination of public necessity for a *taking* with a promise of full and fair *compensation* for the property taken. *See* I.C *infra*. Accordingly, this Court has held throughout this century that when a legislature has found the ends to be served by a taking

public, "[i]ts decision is entitled to deference unless it is shown to involve *an impossibility*." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (emphasis added).

The Ninth Circuit's application of the strictest scrutiny when all relevant precedent called for the most minimal, and its attempt—in a throwback to an era long since past—to substitute *its* view of the public good for the Hawaii legislature's view, must therefore be reviewed and reversed; an affirmance of the ruling below would mark this as the very first twentieth-century invalidation by this Court of a legislature's determination that a particular exercise of the power of eminent domain, with just compensation, serves a public purpose.

A. The Hawaii Land Reform Act Is Classic Socioeconomic Legislation, Designed To Serve Basic Public Purposes.

Although the history of Hawaii's land ownership system is unique, the purposes the Hawaii legislature intended the Land Reform Act to serve—purposes evident on the face of the extensive legislative findings expressed in the Act—are all matters of typical, and by now traditional, legislative concern. Indeed, were the asserted purposes of the Act to be found illegitimate, a vast array of regulatory schemes—ancient and modern, state and federal—would likewise be called into question.

First, the Act was designed to free the alienability and turnover of land in Hawaii from the restrictive grip of the long-term lease system. Removing restraints on alienation has long been a basic purpose of Anglo-American statutes as well as of many common law property rules. For example, Parliament under Edward I enacted *Quia Emptores* in 1290 to empower tenants to alienate land freely so long as, rather than subinfeudating, they substituted their grantees for themselves in order to preserve their overlords' feudal incidents. Similarly, Pennsylvania and Maryland, in which systems of perpetually renewable long-term land leases had prevailed since the first colonial crown grants, enacted legislation to enable lessees to acquire freely alienable title to the land they lived on—Pennsylvania in 1855 by providing that any ground rents unpaid and undemanded for 21 years would be extinguished, and Mary-

land in 1888 by requiring that any long-term lease include an optional right of redemption of the fee by the lessee.[41]

Second, in addition to allowing any particular land parcel to be more freely transferred *vertically* from landowner to landowner over time—instead of being trapped perpetually in the hands of a single landowner—the Land Reform Act was designed to spread land ownership *horizontally* by enabling more Hawaii residents to acquire the land on which they live. Maximizing opportunities throughout American society for people to own their own homes is a purpose central to a complex of federal programs never challenged for being insufficiently public in purpose—for example, mortgage financing through the Federal Home Loan Bank System and the Federal National Mortgage Association, mortgage insurance subsidized by the Federal Housing Administration, favorable tax treatment for home ownership under the Internal Revenue Code, and construction of various forms of public housing.

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41 Laws aimed at reducing restrictions on the alienability of land are but special examples of the general legislative power to remedy public injury caused by particular patterns of landholding. Thus this Court upheld the Pennsylvania law as a legitimate exercise of the police power for "the general convenience," *Wilson v. Iseminger*, 185 U.S. 55, 60-61 (1902), and the Maryland Supreme Court found the Maryland law a sound exercise of public policy based on "a well-grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the City of Baltimore," *Stewart v. Gorter*, 16 A. 644, 645 (Md. 1889). The Hawaii legislature found the residential leasehold system no less injurious to the people and the economy of Hawaii.

Nor is it beyond the scope of the police power to remedy such injury by reallocating the bundle of property rights in any given parcel of land. The great Statute of Uses, enacted by Parliament in 1536 under Henry VIII, for example, curbed two mischiefs of the "use" system—the non-registry of title to land, and the evasion of feudal incidents owed feudal lords, including the King, by those who conveyed uses to their lands—by simply conferring full legal ownership of land on those who had held mere uses in that land. And as this Court stated in *Wilson v. Iseminger*, a state may promote the general convenience not only through such obvious devices as safety laws or divorce laws, but also through laws that redefine property rights: " 'estates held in joint tenancy and in common may [under a state's "police power"] be divided among the tenants, even by conversion and sale; life estates may be separated from each other; qualified inheritances expanded into absolute fee, and contingent and executory interests extinguished.' " 185 U.S. at 61.

Third, as the flip side of multiplying opportunities for land ownership, the Act is designed to disperse the extraordinarily concentrated market power of a small oligopoly of landowners in Hawaii, and to increase the bargaining power of lessees in relation to those landowners. Breaking up concentrated economic power so as to enhance competition, efficiency, and the functioning of the market is the classic purpose of the antitrust laws, and the states are clearly empowered to order monopolists or oligopolists to divest their property. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 & n.13 (1978). Not since such decisions as *Coppage v. Kansas*, 236 U.S. 1 (1915), which suggested that inequalities of bargaining power are "but the normal and inevitable result" of liberty of contract, *id.* at 17-18—decisions thoroughly repudiated by this Court for the last half-century[42]—has it been doubted that regulation tending to offset the unequal bargaining power of employer and employee, or of landlord and tenant, is well within ordinary legislative authority. Nor is that authority in any way diminished merely because such regulation may disappoint the expectations built up by the disproportionate market power previously enjoyed by the landlord; many indisputably public and uncontrovertibly legitimate rent-control, condominium-conversion, and mandatory option-to-purchase ordinances do just that.

Fourth, in addition to being designed to reform the residential land market, the Act is designed to serve a variety of other purposes important to the general public welfare of the state—to the "moral, social, economic, and physical well-being of the community," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952), as well as to its "spiritual" and "aesthetic" values, *Berman v. Parker*, 348 U.S. at 33. It is designed—like much fiscal and monetary policy—to stabilize the cost of living by curbing land prices and rents. It is designed to prevent

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42 It is not clear that the court below took any notice of the demise of *Coppage*, however, for the majority opinion—in a passage reminiscent of that case and devoid of any modern authority—cites Madison's statement, " 'In all civilized societies, distinctions [of property] are various and *unavoidable*,' " as authority for its invalidation of Hawaii's law. *See* 702 F.2d at 791 (emphasis added). A7.

families from having to watch as their lifelong homes are razed by the bulldozers of landlords with more profitable uses of the land in mind. It is designed to avoid whatever social disruption or disobedience to law the harsh strictures of the residential leasehold system might inspire. It is designed to reduce social expenditures needed by casualties of the residential leasehold system, such as the elderly lessees who must be publicly housed because they cannot afford their renegotiated rents. And it is designed to give Hawaii residents the opportunity to acquire and enjoy full equity in their homes and homesites, to pass on to their children or to sell as they please—an opportunity that might well keep some from abandoning the state in desperation, or inspire others to build more enduring residences, secure in the knowledge that the land on which they have made their homes cannot be pulled out from under them at the end of decades-long leases.

"The concept of the public welfare is broad and inclusive," *Berman v. Parker*, 348 U.S. at 33; each of these purposes of the Hawaii Land Reform Act falls well within its bounds. And the *combination* of these purposes yields not merely a rational, but a compelling, justification for the Act.

B. Neither The Economic Benefit Conferred On One Group, Nor The Economic Harm Inflicted On Another, Can Invalidate Regulations A Legislature Could Rationally Have Believed Would Advance Such Public Purposes.

The court below not only wholly ignored the manifold purposes underlying the Hawaii Land Reform Act, but also wholly ignored the federal constitutional standard by which all state socioeconomic legislation is to be judged. Those challenging socioeconomic legislation—whether on substantive due process or on equal protection grounds—must show "that the legislative facts on which [a law] is apparently based could not reasonably be conceived to be true by the [legislature]." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). So long as "the question is at least debatable," *United States v. Carolene Products Co.*, 304 U.S. at 154, those who attack economic legislation as not reasonably calculated to advance legitimate state goals "cannot prevail," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S.

456, 464, 470 n.12 (1981).[43] The court below gave no reason for so entirely disregarding this standard other than to suggest that, when the state takes property from one set of private parties to the immediate benefit of another, that transfer is per se invalid as serving a private purpose—notwithstanding payment of full compensation. *See* 702 F.2d at 798 (A21); *id.* at 806 (A36).

Even *uncompensated* redistribution of economic advantage through *regulation*, however, is not invalidated, nor even subjected to higher than minimal scrutiny, merely because it imposes economic costs on, or denies economic opportunities to, "A" in order that "B" may gain. Virtually all of the very cases that reiterate the minimal rationality standard involved state regulations that destroyed or impaired one set of investment-backed property interests in order to protect or enhance another that the legislature deemed it in the public interest to prefer. In *Miller v. Schoene*, 276 U.S. 272 (1928), the economic benefit conferred on apple owners at the direct expense of cedar owners did not invalidate a state regulation requiring the uncompensated destruction of infected cedar trees in order to save nearby apple trees. Indeed, Justice Stone wrote for a unanimous Court that

> [i]t will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvi-

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43 *Accord, United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-78 & n.10 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 124-25; *New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam); *Ferguson v. Skrupa*, 372 U.S. 726,729-31 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. at 425 (Court's "recent cases . . . leave debatable issues as respects business, economic, and social affairs to legislative decision"). Furthermore, contrary to the implications of the concurring opinion below, *see* 702 F.2d at 804-806 (Poole, J.) (A32-36), it is clear that "whether *in fact* the provision will accomplish its objectives is not the question: the [Fourteenth Amendment] is satisfied if . . . the . . . [state] legislature rationally *could* have believed that . . . [it] would. . . ." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466; *Vance v. Bradley*, 440 U.S. at 112.

ous that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.

Id. at 279.

Regulation has similarly been upheld on a minimum-rationality standard against Fifth and Fourteenth Amendment challenge notwithstanding the fact that it conferred a distinct economic advantage on, for example, truck owners advertising only their own wares at the expense of those seeking to advertise the wares of others,[44] on eye doctors at the expense of opticians,[45] on lawyers at the expense of debt adjusters,[46] on established pushcart food vendors at the expense of "vendors of more recent vintage,"[47] on retail car franchisees at the expense of automobile manufacturers seeking to open competing franchises,[48] on railroad workers connected with the in-

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44 *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a city ordinance forbidding advertising on trucks except by the truck owner of his own goods or services, on the ground that local authorities may well have concluded that the latter posed less risk of distraction to traffic).

45 *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (upholding a state statute forbidding an optician from fitting or duplicating lenses without a prescription from an opthamologist or optometrist, on the ground that the legislature might have concluded that a prescription was necessary often enough to require one in every case).

46 *See Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (upholding a state statute forbidding debt adjusting except by those authorized to practice law, on the ground that the legislature could have concluded that the business of debt adjusting lacked social utility).

47 *See New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (per curiam) (upholding a city ordinance banning from the historic Vieux Carre all vendors except two who had operated there for over eight years, on the ground that the city could reasonably decide that the two exempted vendors had greater reliance interests or had themselves become part of the charm of the district).

48 *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding a state statute permitting existing franchisees to trigger administrative review of prospective manufacturer dealerships, on the ground that the legislature was "empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchi-

dustry as of 1974 at the expense of those with similar experience lacking so recent a connection,[49] and on the paperboard industry at the expense of the plastic container industry.[50] In short, this Court has long since decisively rejected the losing argument made before it by the cedar owners in *Miller v. Schoene*:

> We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another.

276 U.S. at 275 (argument of counsel).

Thus, had Hawaii's legislature chosen to attack the residential leasehold system by means of simple regulation—for example by imposing, as it considered doing and as did Maryland long ago, a mandatory option-to-purchase requirement on all long-term leases—the proposition that the landowners lost economic advantage in order that the lessees might gain would not invalidate it. If the landowners might thus have lost one "political battle," they could have been expected to win others in the ordinary give-and-take of the "legislative forum," *see United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).[51] As Justice White wrote for the Court in

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sees where necessary to prevent unfair or oppressive trade practices," *id.* at 107, or to redress "disparity in economic power" between the two, *id.* at 111 (Marshall, J., concurring)).

49 *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177-78 (1980) (upholding an Act of Congress eliminating dual retirement benefits for workers without a 1974-or-later connection with the industry, on the ground that Congress could have concluded that such funds ought to be used first for those more recently working as railroaders).

50 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (upholding state ban on the sale of milk in nonrefillable plastic but not in nonrefillable paperboard containers, on the ground that the legislature could rationally have concluded that such a ban might have environmentally desirable effects).

51 Indeed, the very fact that Bishop Estate lobbied, for federal tax reasons, against the Maryland law in favor of the condemnation law that was

Vance v. Bradley, "The Constitution presumes that, absent some reason to infer antipathy, . . . decisions [if "improvident"] will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 440 U.S. at 97. To apply strict scrutiny to such a regulation would be to treat as a discrete and insular minority a class distinguished only by its wealth in Hawaii landholdings.[52]

And it would most assuredly make no sense to hold that eminent domain, *with* compensation, may sometimes be forbidden even though a police regulation having the same purposes and effects, but *lacking* in compensation, might be upheld. For that would perversely press the state into achieving by uncompensated regulatory action what federal judges would prevent the state from accomplishing by compensated exercises of eminent domain. The upshot would be *less* protection for the private interests adversely affected, *and* reduced flexibility for the state—a clear loss to all concerned. As detailed in I.C *infra,* the relevant and well-settled law leads to no such absurd result.

C. Whether A State's Exercise Of The Taking Power Serves A Public Purpose Is Likewise Reviewable By A Federal Court Only For Minimum Rationality.

Even where a regulation under the police power so greatly diminishes "A" 's economic advantage as to transform it into a taking and to require compensation, *see Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922), the fact that "B" may be the immediate beneficiary of the regulation—as were the surface dwellers in *Mahon* from the state's ban on sub-dwelling coal mining—cannot condemn that statute as private in purpose. Nor can the mere fact that property taken by eminent domain is transferred in the first instance to private beneficiaries condemn that taking—automatically, or even presump-

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ultimately enacted, *see* n.8 *supra,* demonstrates that its voice was heard—and heeded— in the state's legislative process.

52 The Ninth Circuit seems to have done just that. *See* 702 F.2d at 798 (need to protect "the landed minority"). A21.

tively—as having only a private purpose. *Berman v. Parker*—in which this Court held that, as in the case of all socioeconomic legislation, "[t]he role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one," 348 U.S. at 32--clearly establishes this proposition. For that decision, by a unanimous Court, upheld a taking of a department store's land for transfer to a private housing developer. Flatly rejecting the argument "that this makes the project a taking from one businessman for the benefit of another businessman," Justice Douglas wrote that, once the public purpose of the taking is established, the use of the taking power is just another means to that end, and all decisions about *how* to deploy that power—such as whether to transfer the property to a private or public redeveloper, or whether to condemn on an area-wide basis or on a site-by-site basis—are for the legislature alone to resolve. *Id.* at 33-34.

Long before *Berman v. Parker*, moreover, this Court had laid to rest any notion that literal "use by the general public" was a prerequisite to a finding of public purpose in a taking of property, and had upheld numerous takings whose immediate beneficiaries were one or more private individuals. *See, e.g., Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 531 (1906); *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896). *See also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 323 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946); *Government of Guam v. Moylan*, 407 F.2d 567, 568 (9th Cir. 1969).[53] *See generally* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

The standard of review evolved in these cases, and in cases involving the federal taking power, is one of "well-nigh conclusive" deference, *Berman*, 348 U.S. at 32, to any legislative determination that a taking will serve a public purpose, so long as that determination is not so manifestly irrational as to

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53 The Ninth Circuit's decision below is squarely in conflict with both these precedents, as well as with this Court's holding in *Berman v. Parker*.

involve "an impossibility." *Old Dominion Co. v. United States*, 269 U.S. at 66; *see United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946).[54] The only reason given by the court below for its utter disregard of this standard in this case was its view that, except for certain "historically accepted" situations supposedly fixed for all time by stare decisis, *see* 702 F.2d at 794, 795-96 (A12, A14-16),[55] such deference need apply only when takings effect concrete changes in the use or possession of the land taken, *id.* at 794-95 (A13-14).

This mechanical view, however, has no basis whatever in the case law, and indeed blindly ignores the fact that, in some circumstances, it is *only* compensated reallocation of *ownership* in land that can effect the public benefit sought. The Statute Of Uses, after all, changed neither use nor possession, but merely rearranged the bundle of legal rights to each parcel of land it affected. *People of Puerto Rico v. Eastern Sugar Associates*, furthermore, upheld a land redistribution program that, among other measures, created homestead rights in those squatting on the land. *See* 156 F.2d at 319, 325. And in perhaps the most analogous setting of all, the Maryland Supreme Court rejected the argument that lessees' options to purchase their leased land—options that, if exercised, change ownership, not use or possession—per se confer only private benefit: "it was the *system* of these long leases, irredeemable until the end of the term, that the legislature wished to break up, *rather than any special consideration for the lessees*, that caused the [Maryland] act," *Stewart v. Gorter*, 16 A. at 645 (emphasis added).

In any case, only the most short-sighted could view the Hawaii Land Reform Act as failing to change the use of land

54 These two decisions reviewed takings authorized by Congress. It is clear, however, that at least as much deference must be paid to state legislatures, in light of the well-settled principle that "a local legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity" and the general welfare. *People of Puerto Rico v. Eastern Sugar Assoc.*, 156 F.2d at 324.

55 It is ironic how quickly the court below, having stressed the importance of judicial oversight of public use, abdicated that self-proclaimed responsibility by reducing the eminent domain precedents to a rigid set of categories immune to historical evolution.

in Hawaii. Even the court below, after all, did not deny that the Act shifts land out of investment use for the speculative purposes of absentee landowners into personal use for the residential purposes of its occupants. *See* 702 F.2d at 796-97. *Cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Viewed from a long-term perspective and in macrocosm, such a shift could make an enormous difference to Hawaii's development and overall pattern of land use. Land distributed in small parcels among many owners, for instance, is unlikely to be pooled for large investment projects such as a single large landowner might wish to construct.[56]

Nor can there be any other justification, on the facts of this case, for the Ninth Circuit's radical departure from established standards of judicial deference to legislative determinations that a taking will serve a public purpose. For even if heightened scrutiny should attach to takings that physically dispossess people from land they own and occupy,[57] *no* such dispossession is involved here. On the contrary, the very purpose of the Act is to *enhance* the security of those who live on the land by enabling them to buy it.

And even if heightened scrutiny should attach to takings of property whose immediate beneficiaries are a few individuals or corporations identifiable in advance, posing risks of legislative favoritism,[58] such a standard is altogether irrelevant here. For the immediate beneficiaries of the Hawaii Land Reform

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56 The Bishop Estate itself, in fact, is evidently withholding altogether from sale to current leaseholders certain beachfront properties for which "it apparently wants to keep open such future options as resort development." The Honolulu Advertiser (July 20, 1983) at A-3, col.2.

57 This was an argument made by the dissenters in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation of a residential neighborhood for industrial redevelopment). *See id.* at 474 (Ryan, J., dissenting) (a taking that compels people to leave "a lifelong home and community" should be scrutinized more closely than mere taxation).

58 This argument was also made by the dissenters in *Poletown*, where General Motors Corporation was the immediate beneficiary. *See id.* at 468-70 (Ryan, J., dissenting); *id.* at 463-64 (Fitzgerald, J., dissenting).

Act are the class of *all* residents who are or who become land lessees of small parcels, or to whom the HHA otherwise sells parcels that it condemns—a general and open class whose members are *not* identifiable in advance.

It follows that the Ninth Circuit's facial invalidation of the Land Reform Act was as unwarranted as it was unprecedented—an unjustifiable blow both to the legitimate land-use aspirations of Hawaii's people, aspirations the state legislature aptly described as the "American dream,"[59] and to the sovereign lawmaking authority of their elected legislative representatives.

II. IF APPELLEES' FEDERAL CONSTITUTIONAL CHALLENGE WERE TO BE DEEMED COLORABLE, THEN SETTLED PRINCIPLES OF FEDERAL JUDICIAL RESPECT FOR STATE PROCESSES WOULD REQUIRE ABSTENTION OR DISMISSAL.

If, as appellants contend (*see* I *supra*), the federal constitutional claim against the Hawaii Land Reform Act "is utterly without substance," then perhaps its "avoidance . . . [could not] justify a federal court's failure to exercise its jurisdiction" to reject that claim. *See Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 34 (1959) (Brennan, J., dissenting). Were this Court to agree with that assessment of the merits, then it might follow that "[t]he district court acted correctly in declining to abstain from the exercise of its jurisdiction," 702 F.2d at 790 n.1 (A4), and in proceeding summarily to reject the federal constitutional attack upon the Land Reform Act.

But no such view can support the Ninth Circuit's disposition of the abstention issue. For, far from regarding the federal challenge as too frivolous to make abstention appropriate, that court deemed the challenge so weighty as to compel facial invalidation of the Act—at the very moment the state's courts were being pressed by appellees to find that the Act either does not authorize the condemnation of their lands or, if it does, that it takes their lands for no "public use," and thus contravenes Article I, Sec. 20, of the Hawaii Constitution, which

59 1967 Haw. House Standing Committee Report No. 827.

provides that "[p]rivate property shall not be taken or damaged for public use without just compensation."

The meticulous and insistent way in which the state's courts have both required administrative hearings by the HHA into this "public use" issue and re-examined that issue in judicial trials casts grave doubt on the surmise of the court below that Hawaii's "public use" requirement is but a " 'mirror image' " of the Fourteenth Amendment's due process clause. 702 F.2d at 800 (Poole, J., concurring) (A24); *see also id.* at 789-90 n.1 (A3-4). In this case, unlike *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 597-98 (1976), both the relevant text of the state's statutory and constitutional law,[60] and the practice to date under both, preclude any confident prognosis that Hawaii's judges and administrators will, under state law as authoritatively construed by the Hawaii Supreme Court, treat the findings of the Hawaii Legislature as deferentially as a federal court is bound to do.[61] On the contrary, as matters now stand, it remains entirely possible that a state appellate adjudication—one arising out of any of several dozen pending proceedings—will overturn the Hawaii Legislature's and/or the HHA's findings, either wholesale or as applied to the tracts held by appellees, and will thereby moot appellees' federal claims so as to render

60 The phrase "public use," appearing both in Hawaii Rev. Stat. § 516-83(a)(12), and in Hawaii Const. art.I, § 20, appears nowhere in the Fourteenth Amendment, whereas the phrase "equal protection of the laws," 426 U.S. at 598 (quoting Puerto Rico Const. art.II, § 7), obviously does. That this Court in *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417 (1896), "incorporated" a "public use" requirement of sorts into the due process clause hardly converts the latter into a carbon copy of state statutory and constitutional limits upon the eminent domain power. *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 600-08 (1949) (nineteenth-century state courts developed narrow definitions of "public use" to protect private property from state takings that were rapidly increasing as industrial development accelerated).

61 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 461 n.6 (states are "free to allocate the lawmaking function to whatever branch of state government they may choose," and thus to delegate to their own agencies or courts as much of a legislative second-guessing function in enforcing state, albeit not federal, constitutional norms as they wish); *cf. id.* at 479-81 (Stevens, J., dissenting).

their acceptance by the court below wholly advisory. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

Given the risk that the Ninth Circuit's ruling will thus prove to have been entirely gratuitous, that court's eagerness to reach and sustain appellees' federal constitutional challenge to a state statute is especially hard to countenance in a federal system such as ours. For the Land Reform Act surely "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open." *See Pullman*, 312 U.S. at 498. Whenever reviewing the validity of state takings, this Court has observed that what is a "public use" depends heavily on circumstances about which state courts have special familiarity that federal courts must treat with "very great respect." *Fallbrook Irrigation District v. Bradley*, 164 U.S. at 160-61. *See also Strickley v. Highland Boy Mining Co.*, 200 U.S. at 530; *Clark v. Nash*, 198 U.S. at 367-69. Accordingly, this Court's abstention rulings have been particularly sensitive to the unique role of eminent domain as "intimately involved with sovereign prerogative." *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. at 28.

Moreover, this case, like *Thibodaux*, "present[s] difficult questions of state law bearing on policy problems of substantial public import . . . transcend[ing] the [substantive issues] in the case . . . at bar." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976). In *Thibodaux*, those separate state-law questions involved the relationship of municipalities to the state, under Louisiana law, in wielding the power of eminent domain. Here, those distinct state-law questions involve the relationship of courts and agencies to the legislature, under Hawaii law, in assessing the public purposes allegedly served by a taking of land. If the Supreme Court of Hawaii were to sit as a superlegislature—a choice surely within its power under the Federal Constitution—and if it were, in that capacity, to rule that the takings at issue put land to no "public use" as that concept is employed in Hawaii law despite the state legislature's and the HHA's contrary views, then a ruling on a wholly independent state law issue—that of the state's internal allocation of lawmaking

authority—would have exposed the folly of the Ninth Circuit's anticipatory intervention.

Paradoxically, however, that intervention, if sustained by this Court, would halt the very proceedings in which the Hawaii Supreme Court might render just such a ruling—for all such proceedings arise out of a state law held facially void in the judgment here being appealed.[62] Of course, had the judicial proceedings against appellees which are now *en route* to the Supreme Court of Hawaii been filed in state court *prior* to appellees' launching of this federal challenge in February 1979, the principles enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), would flatly preclude such direct federal intrusion into pending state proceedings quite apart from the dictates of *Pullman* and *Thibodaux* abstention. *See Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975) (extending *Younger* to state condemnation suits). That the judicial proceedings in state court instead began *after* those in federal court might be thought to render *Younger* technically inapplicable but cannot make its underlying philosophy irrelevant.

Moreover, even as a *technical* matter *Younger* might well directly bar the federal intrusion engineered below—since the administrative hearing at which the statutorily-required "public purposes" finding must be made by the HHA, *see* Hawaii Rev. Stat. § 516-22, in fact took place in the Kamiloiki Valley case (and others) *before* this federal action was instituted. *See* Statement of Case, *supra*, at pp. 6-7. To be sure, not *all* administrative proceedings are necessarily equivalent to judicial proceedings for *Younger* purposes. But appellees evidently viewed *these* proceedings as judicial in character when they submitted to the HHA the very same federal constitutional arguments against the impending condemnation that they subsequently presented to the federal district court.

Whether appellees were correct in this view of the judicial capacity of the HHA poses purely a question of Hawaii law on

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62 Indeed, appellees seek at this very moment to have the Ninth Circuit *enjoin* all such state proceedings in order to enforce its declaration of the Act's federal invalidity. *See* Emergency Motion to Recall or Clarify Mandate in No. 80-4368, filed by appellants in the Ninth Circuit on July 19, 1983.

which Hawaii's courts have yet to speak. At the very least, therefore, for the Ninth Circuit itself to rule—without the benefit of state judicial guidance—that "the public hearings before the [HHA] bear none of the attributes of a judicial proceeding," 702 F.2d at 802 n.5 (Poole, J., concurring) (A29); *id.* at 790 n.1 (opinion of Alarcon, J.) (A4), only compounded the violation of *Pullman* and *Thibodaux* and constituted an independent violation of *Burford v. Sun Oil Co.*, 319 U.S. 315, 325-32 (1943), in which this Court counseled against federal judicial guesswork about such peculiarly complex and specialized local matters as the relation of a state's judicial to its administrative processes in allocating scarce natural resources. Unlike a case in which a state administrative body is structurally "incompetent . . . to adjudicate the issues," including the federal constitutional objections, "pending before it," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), here it simply cannot be said by a *federal* court that "the predicate for a *Younger v. Harris* dismissal was lacking." *Id.*

Thus the Ninth Circuit's rush to federal judgment not only flouted settled principles of abstention but might also, as a partial corollary, have breached *Younger*'s requirement of "outright dismissal," *Gibson*, 411 U.S. at 477. That the proper application of *Younger* may be clouded by state-law uncertainties simply underscores the circuit court's error in taking Hawaii's procedural law into its own hands for purposes of holding Hawaii's substantive law violative of Fourteenth Amendment due process.

CONCLUSION

The Ninth Circuit's invalidation of vital state legislation thus represented an impermissible assault on all three branches of state government. Had the federal challenge to the Land Reform Act been as serious as the circuit court deemed it, the only course consistent with our federal system would have been abstention or dismissal. Instead, having erroneously bypassed the state executive and judicial branches, the court below shattered all twentieth-century precedent by substituting its notions of Hawaii's land-use needs for those of the state legislature. No branch of any state's government may rest secure while so roving a commission is at large. To correct such federal judicial excess, this Court should note jurisdiction and ultimately reverse the judgment below.

Respectfully submitted,

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